IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 75

FEDERAL TRADE COMMISSION,
Petitioner,

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

On Petition of Solicitor General for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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HAUSER PRINTING CO., INC., NEW ORLEANS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 147-152) is reported at 194 F. (2d) 633.

JURISDICTION

The jurisdictional requisites are set forth in the petition of the Solicitor General.

QUESTION PRESENTED

The case presented by the above petition is this: Whether the Federal Trade Commission can restrain a

motion picture advertising company from entering into a contract with a motion picture theatre exhibitor which gives the advertising company the exclusive right to exhibit advertising films on the screen of the theatre for a period of five years.

The Federal Trade Commission (by a majority vote) held that such an exclusive right was permissible for one year, but not for five years. The Court of Appeals for the Fifth Circuit unanimously set aside the order of the Commission, holding that an exclusive right for five years is valid.

The sole issue presented in this matter is whether such an exclusive theatre screening agreement for a term of five years constitutes an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45) and, as such, whether the prevention of such method is in the interest of the public in that it (a) unduly restrains competition; or (b) has created, or tends to create, in respondent, a monopoly.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C. 45.

STATEMENT OF THE CASE

There is no charge in the complaint of any combination or conspiracy. The sole charge is that respondent has been, individually, guilty of an unfair method of competition.

The record establishes without dispute (1) that the time and space for the exhibition of motion picture ad-

vertising films on theatre screens is severely limited to from three to six ads, or an over-all of two to four minutes of the time consumed by each show; (2) that from the very beginning of the industry, more than thirty years ago, all motion picture advertising companies alike (hereinafter referred to as distributors) have solicited and obtained exclusive theatre screening agreements for a duration up to five years; (3) that there is, and always have been, free, open, active and substantial competition among all distributors in the securing of theatre screening agreements; and (4) that one-year contracts are not practical for the following reasons: (a) Theatre screens are not fully available until fourteen or fifteen months after the inception of the contract, due to the fact that films of the predecessor distributor are generally played out to completion by the theatre; (b) It takes many months after selling advertising to produce a film and start the screening of it in the theatre; (c) Considerable sums are spent by the distributor in traveling and other expenses of salesmen in order to secure screening privileges, and these expenses are not justified if the screening agreement is limited to one year; (d) A distributor could not afford to pay minimum guarantees demanded by theatres if the term is limited to one year; (e) A distributor could not afford to spend hundreds of thousands of dollars each year to keep current "library films" unless it could be assured of screen space for more than one year in which to exhibit the films; (f) No one would invest capital in the business of the distributor without assurance of a market for more than one year; and (g) Finally, theatre owners themselves frequently demand guarantees for more than one year, or otherwise refuse to exhibit motion picture advertising.

ARGUMENT

Taking into consideration all of these facts, we respectfully submit that exclusive theatre screening agreements for a term of five years are not unreasonably long, do not unduly suppress competition, and do not have a tendency to create in respondent a monopoly. They surely do not constitute an unfair trade practice. Such contracts have been entered into by all distributors, both large and small, from the very inception of the industry more than thirty years ago. The practice of obtaining exclusive contracts is not some new scheme adopted by respondent to stifle competition. All of the testimony shows that theatres frequently change distributors from time to time. The Government's own witnesses testified that the motion picture advertising business could not be operated without exclusive theatre screening agreements, and further stated that such agreements were advantageous, not only to the distributor, but also to the theatre owner, the advertiser and the public. The record fails to establish that any of respondent's competitors were forced out of business because of exclusive theatre screening agreements. The few who took the stand for the Commission admitted that they lost out in competition because of the inferior quality and character of the films furnished by their producers, the lack of such films during the war years, their own lack of sales organization, and in some cases, their failure to pay the theatres in accordance with their contracts.

As the Solicitor General's petition says (pages 8 and 9 thereof):

> "The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such

that prospective advertisers require an assured outlet 'for a reasonable time', M.P.A.'s use of exclusive contracts for periods longer than one year 'was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management (R. 152)."

As a matter of fact, as the Court of Appeals in its decision found, the record shows:

> "The available space for screening advertisements is limited, as only about 60 per cent of the theatres accept film advertising; in addition, theatre patrons resent the showing of too much of this character of advertising, and thus impose economic barriers on the amount that may be run. The time consumed that will be tolerated by the public is said to be from three to six minutes, or from two to four per cent of the time consumed by the show."

The Court of Appeals said further:

> "The Commission concluded that an exclusive screening agreement for a period of one year was not an undue restraint on competition, but that such agreement for a longer period should be prohibited. The record shows that there is free and open competition among the distributors to secure such agreements, and that, from the beginning of the industry, distributors have sought and obtained exclusive screening agreements. The Commission having determined that exclusive agreements are not unfair or illegal *per se* but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person would invest sufficient capital in the business without assurance of exclusive screening space for a longer period than one year; and that theatres themselves frequently demand guaranties for a longer period, or other-

wise refuse to exhibit motion picture advertisements."

And the Court concluded by saying:

"Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence; then no means that are just, truthful, reasonable, and requisite to the successful operation of the business are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

"Therefore, with available space and time for advertisements on the screen for motion-picture exhibitors severely limited, with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioner's method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. (citing numerous authorities)"

The dissenting Federal Trade Commissioner's reasoning, quoted by the Court, is to the same effect.

THE LAW

In *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, the Court said:

"The words 'unfair method of competition' are not defined by the statute and their exact

meaning is in dispute. It is for the courts, not for the Commission, ultimately to determine as a matter of law what they include. **They are clearly inapplicable to practices never heretofore regarded as opposed to good morals * * * or as against public policy** because of their dangerous tendency unduly to hinder competition or create monopoly. **The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.**" (Emphasis supplied.)

The complaint contains no intimation that respondent did not properly obtain exclusive theatre screening agreements. So far as appears, acting independently of their competitiors, respondent undertook to negotiate these contracts with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition.

In *Federal Trade Commission v. Raladam Company*, 283 U.S. 643, 646, 647, the Court said:

> "By the plain words of the Act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisities: (1) that the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appear to be in the interest of the public."
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> * * * * *
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> "The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

In applying the principles of the *Raladam* case to the case at bar, the Court of Appeals for the Fifth Circuit said:

> "The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites to the power of the Commission to issue its order in this case to cease and desist. Cf. *Federal Trade Commission v. Raladam Company*, 283 U.S. 643, 646, 648."

In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 361, the Chief Justice used the following language:

> "The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.
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> * * * * *
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> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.
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> * * * * *
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> "It is therefore necessary in this instance to

consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

Mr. Justice Brandeis said in *Board of Trade v. United States*, 246 U.S. 231, 238, 239:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

The general rule and its exception are well stated

in *Binderup v. Pathe Exchange*, 263 U.S. 291, 312,. in which the Court said:

> "It is doubtless true that each of the distributors, **acting separately,** could have refused to furnish films to the exhibitors without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. **The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor."** (Emphasis supplied)

In *Federal Trade Commission v. Paramount Famous-Lasky Corporation, et al*,. 57 F. 2d 152, the Circuit Court for the Second Circuit said at page 157:

> **"The respondent is not required, under the law, to so conduct its business that every competitor may conduct his with an equal degree of success according to his size and importance. It was not the purpose of the act to equalize opportunity or insure an equal degree of success upon the part of all competitors in a given industry, but it was its purpose to preserve, for the benefit of the public, active competition therein, and where there is no question of monopoly involved, the question is whether the method of competition described has a dangerous tendency unduly to hinder competition.** *Fed. Trade Comm. v. Gratz, supra.* As the Supreme Court put it in *Fed. Trade Comm. v. Curtis Pub. Co., supra,* **'Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.'**
>
> **"In the instant case, there is no finding that the respondent combined with other large pro-**

> **ducers** for the purpose of hindering those outside the large combination, and the evidence would not warrant such a finding. **In the absence of combination or agreement, the fact that the method of negotiation as practiced by the respondent tends to exclude other independent producers is of itself insufficient to establish any probable tendency toward the creation of the evils prohibited by the Sherman Anti-Trust Act** (15 USCA § 1 et seq.). Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of competitors. *Fed. Trade Comm. v. Standard Oil Co.*, 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746." (Emphasis supplied)

In the case of *United States v. Western Union Telegraph Company, et al.*, 53 Fed. Supp., 377, a proceeding in equity was instituted by the United States against Western Union Telegraph Company and certain of its officers to enjoin the enforcement of certain exclusive contracts that had been entered into with various railroad, transportation and terminal companies, hotels, public buildings and sports arenas. The agreements were lease arrangements whereby Western Union, as lessee, was granted the exclusive right of occupancy, the lessors covenanting that during the term of the agreements no space in the premises would be leased to competing telegraph companies. The petition charged (a) a conspiracy among the defendants to restrain trade in commerce; (b) that the enforcement of the contracts was in restraint of trade in commerce; and (c) that the defendants had attempted to monopolize interstate trade in commerce in telegraph communication.

The District Court for the Southern District of New York, in an opinion by Nevin, D.J., at page 381, stated the question for determination as follows:

> "The Government's case stands or falls on the question whether the contracts, singly or in the aggregate, constitute a violation of the Sherman Act. Section 3 of the Clayton Act, 15 U.S. C.A., § 14, prohibiting certain restrictions in connection with the sale or lease of tangible property, the source of so many of the decisions on which the Government usually relies in anti-trust cases, does not apply and is not invoked. The Federal Trade Commission Act, 15 U.S.C.A. § 41, *et seq.*, does not apply to telegraph companies and is not invoked. The question arises under the Sherman Act alone, and the issues are these: (1) Whether the contracts are unlawful restraints of trade under Section 1. (2) Whether, if not, defendants can be held to have unlawfully monopolized or attempted to monopolize commerce under Section 2 by means of a series of such contracts any of which separately would concededly be lawful."

The Court held that the Sherman Act had not been violated and ordered the petition dismissed, and, in so holding made, among others, the following Conclusions of Law at page 392:

> "3. The defendant company and its officers, the individual defendants, have not engaged in a conspiracy to restrain trade and commerce in telegraph communication and to monopolize such commerce by making exclusive contracts with railroad, transportation and terminal companies, the owners of hotels, public buildings and sports arenas, for the purpose of excluding competing telegraph companies from such premises and therefore have not violated Sections 1 and 2 of the Sherman Anti-Trust Act.

"4. The exclusive contracts entered into by the defendant company and railroad, transportation and terminal companies, the owners of hotels, public buildings and sport arenas, while gaining for the defendant company a competitive advantage, do not constitute an unreasonable restraint of interstate trade and commerce in telegraph communication in violation of Section 1 of the Sherman Anti-Trust Act.

"5. The exclusive contracts with railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas entered into by defendant through its officers and agents, do not form a part of a nationwide plan to exclude competing telegraph companies from such locations, but rather are of the usual incidents attendant to a vigorous prosecution of the business of the defendant, and the defendant company and its officers and agents have not attempted by means of such contracts to monopolize interstate trade and commerce in telegraph communication in violation of Section 2 of the Sherman Anti-Trust Act.

"6. The exclusive provisions of the contracts between the defendant and the railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas are lawful and valid and not in violation of the terms of Section 1 and 2 of the Sherman Anti-Trust Act."

In the case of *Goldberg v. Tri-States Theatre Corp.*, 126 F. 2d (CCA 8th, 1942), two theatre buildings in Omaha, Nebraska, were owned by the same party. The buildings were the State Theatre building and the World Theatre building. The assignee of Tri-States Theatre Corp. had entered into a sublease covering the World Theatre building, which sublease agreement contained a covenant that the owner would not use or per-

mit the use of the State Theatre building as a motion picture theatre. The State Theatre building was thereafter used as a motion picture theatre in violation of this restrictive covenant and a suit was filed to enjoin such use.

The Court, in an opinion by Johnson, Circuit Judge, in upholding the validity of such a restrictive covenant, and in granting the injunction, at page 29 said:

> "The validity of the agreement, as a restraint upon trade, is not seriously open to question under the general contract law of Nebraska. An agreement which places a restriction upon the use of certain real estate is not invalid in Nebraska, as being an unreasonable restraint of trade, where the restriction is purely ancillary to the acquiring of an interest in another piece of real estate for commercial purposes; where it places only a limited restraint as to period and manner of the use of such property; where it does not appear to be greater than reasonably to serve as a protection in accomplishing the legitimate commercial purpose for which the interest in the other real estate involved was acquired; and where it does not have as its primary object or as its direct result the fostering of some illegal monopoly."

The Court of Appeals for the Fifth Circuit, in reversing the Commission in the case at bar also held, and we submit correctly, that the contract between respondent and the theatre is one of agency, citing *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568. In that case the Court upheld an exclusive agreement between Curtis Publishing Company and its distributors requiring the distributors to distribute the periodicals of Curtis Publishing Company to the exclusion of the periodicals of all other competitors during the term of the contract, and, at pages 581 and 582 said:

"The engagement of competent agents obligated to devote their time and attention to developing the principal's business, **to the exclusion of all others,** where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and **exclusive** representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute." (Emphasis supplied)

That case presents an exact parallel with the case at bar. There, Curtis Publishing Company entered into agreements with news dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, respondent enters into agreements with theatres whereunder the theatres are appointed as exclusive agents of respondent to display the advertising films of respondent, subject to the condition that the theatres will not during

the life of the contract, display the advertising films of competitors.

We submit that the principle announced in the *Curtis* case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive, does not constitute an unfair method of competition, and affords no ground for condemnation under the statute.

In *State For Use of Independence County v. Tad Screen Advertising Co.*, 133 S.W. 2d 1, it was held that the advertising distributor did a local business in the state in which the theatre was located, on the ground that the theatre was merely the agent of the advertising distributor to exhibit the film.

We, therefore, submit that the Court of Appeals was correct when it said:

> "In another aspect, we have here a contract of agency, and our decision is governed by *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely granted the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement;

and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period."

CONCLUSION

For the reasons above stated, we respectfully submit that the individual soliciting and obtaining by respondent of exclusive theatre screening agreements from theatre exhibitors for a period of five years do not constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, and that the prevention of such contracts is not in the interest of the public because (a) they do not unduly restrain competition, and (b) have not created, or tended to create, in respondent, a monopoly.

The decision of the Court of Appeals for the Fifth Circuit is not in conflict with the decisions of this Court, or with decisions of any other circuit.

The Court of Appeals for the Fifth Circuit found that respondent's methods of conducting its business were open, honest, without monopolistic tendency, and that the exclusive theatre screening agreements for a term of five years were requisite to the successful operation of the business and, accordingly, not an unfair method of competition in commerce.

We submit that the decision of the Court of Appeals reversing the order of the Commission and dis-

missing the complaint is correct, and that, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, the undersigned, do hereby certify that I have this day served copies of the above and foregoing brief for respondent in opposition to the petition for a writ of certiorari, on the Solicitor General of the United States, by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, June , 1952.

Charles Rosen